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IN THE

Supreme Court of the United States.

No. . October Term, 1941.

PLOW CITY STEAMSHIP COMPANY, CLAIMANT OF THE STEAMSHIP "PLOW CITY" (RESPONDENT-APPELLEE IN THE COURT BELOW),

Petitioner,

v.

TEXAS GULF SULPHUR COMPANY, INCORPORATED (LIBELLANT-APPELLANT IN THE COURT BELOW),

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Plow City Steamship Company respectfully represents:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review the order of that Court entered on September 11, 1941 (R. 164) reversing the decree of the District Court of the United States for the Eastern District of Pennsylvania (R. 12), which dismissed the libel filed by the respondent, Texas Gulf Sulphur Company, Incorporated, against the Steamship "Plow City", whereof the petitioner, Plow City Steamship Company, is the claimant.

I. STATEMENT OF THE MATTER INVOLVED.

The respondent, Texas Gulf Sulphur Company, Incorporated, brought a libel in rem in the District Court against the Steamship "Plow City" for alleged damage to cargo. Petitioner, Plow City Steamship Company, appeared as claimant of that vessel and defended the action.

During a voyage made by the "Plow City" from Galveston, Texas, to Norfolk, Virginia, in October, 1937, with a cargo of sulphur in bulk belonging to the respondent, a considerable quantity of sea water entered the vessel's No. 1 hold, allegedly damaging the cargo carried therein. The District Court found that, upon all the evidence, the "Plow City" was seaworthy and that the water had entered the No. 1 hold by way of a sounding pipe opening on to the forward well deck, the cap to which pipe had become displaced by the straining of the vessel during a storm, or was missing due to failure to replace it. The District Court held that the alleged damage was proximately caused by the displacement of the cap and the failure of the crew to make more frequent inspection of the sounding pipe, and dismissed the libel on the ground that the "Plow City" was exonerated under the provisions of the Harter Act (February 13, 1893, c. 105, §§ 1-8, 27 Stat. 445, 46 U. S. C. §§ 190-195), and the exceptions contained in the bill of lading and charter party.

Prior to the filing of the libel, Fidelity-Phoenix Fire Insurance Company, respondent's insurer, had paid to respondent the full amount of its claim for damage to the cargo in question, under an agreement in the form commonly known as a "loan receipt", that respondent should repay to the insurer only such amounts as the respondent might recover from third parties on account of the loss.

The District Court held that respondent was entitled to bring suit in its own name for the benefit of the insurer, and that the libel was not subject to dismissal on the ground that it was not brought by the real party in interest.

The Circuit Court of Appeals criticized the trial Court for the "desultory manner" in which hearings were held in the case, and termed its conduct of the trial "an abuse of judicial discretion". The Circuit Court of Appeals also criticized the trial Court for not passing specifically on petitioner's requests for findings of fact but merely affirming them "insofar as they are not at variance with the findings and discussions of facts" in the opinion. The Circuit Court of Appeals did not make any findings of fact of its own.

The Circuit Court of Appeals held that the loss of the cap to the "Plow City's" sounding pipe was not attributable to perils of the sea and that claimant could not avail itself of the exceptions set up in the bill of lading and charter party. The Circuit Court of Appeals further held that, by reason of the provisions of the loan receipt, respondent had not received payment of its claim from the insurer and, therefore, was entitled to bring suit in its own name. Finally, the Circuit Court of Appeals reversed the decree of the District Court and remanded the cause with directions to ascertain the damages and enter judgment for the respondent.

II. STATEMENT OF THE BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code (March 3, 1911, c. 231, § 240, 36 Stat. 1157; February 13, 1925, c. 229, § 1, 43 Stat. 938; January 31, 1928, c. 14, § 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926, 28 U. S. C. § 347).

The jurisdiction of the Federal Courts is invoked under § 24 of the Judicial Code (R. S. § 563, Pars. 8, 9, § 629, Par. 6, March 3, 1911, c. 231, § 24, Par. 3, 36 Stat. 1091, October 6, 1917, c. 97, § 1, 40 Stat. 395, June 10, 1922, c. 216, § 1, 42 Stat. 634, 28 U. S. C. § 41 (3)).

The final decree of the Circuit Court of Appeals for the Third Circuit was entered on September 11, 1941. This petition was filed on December 11, 1941.

III. QUESTIONS PRESENTED.

1. Is it reversible error for a District Court to hold, in an action in admiralty for cargo damage, that the damage resulted from one of two causes (either of which would excuse the shipowner), where the evidence excludes every other reasonable hypothesis?

2. May a Circuit Court of Appeals, in an admiralty case, reverse the decree of the District Court and remand the case with directions merely to ascertain the damages and enter final judgment, where it is held that the District Court has not complied with Rule 46½?

3. Is a cargo owner to whom an insurer has paid the full amount of his claim for damage to his cargo, payment having been made under an agreement that the cargo owner shall repay to the insurer only such amounts as the cargo owner may recover from third parties on account of the loss, the real party in interest entitled to maintain an action in admiralty against such a third party?

4. Does a private carrier have the burden of proving that damage to the bailed property was due to an excepted cause, or does the burden of proving a breach of the carrier's obligation to exercise due care rest upon the property owner who asserts it?

IV. REASONS FOR ALLOWANCE OF THE WRIT.

1. The decision of the United States Circuit Court of Appeals for the Third Circuit, pursuant to which it entered its decree of September 11, 1941, is in conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *The Point Chico* (1941), 122 F. (2d) 1.

2. In reversing the decree of the District Court of the United States for the Eastern District of Pennsylvania, the United States Circuit Court of Appeals for the Third Circuit so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision: (Rule 46½ of the Rules of Practice in Admiralty and Maritime Cases; *Panama Mail Steamship Company v. Vargas* (1930), 281 U. S. 670, 50 S. Ct. 448, 74 L. ed. 1105.)

3. In holding that respondent and not its insurer is the real party in interest, the United States Circuit Court of Appeals for the Third Circuit decided an important question of federal law which has not been (despite the decision in the case of *Luckenbach v. McCahan Sugar Co.* (1918), 248 U. S. 139, 39 S. Ct. 53, 63 L. ed. 170), but should be, settled by this Court. (See *Scarborough v. Bartholomew et al.* (1940), 22 N. Y. S. 2d 635.)

4. The decision of the United States Circuit Court of Appeals for the Third Circuit is in conflict with the decision of this Court in the case of *Commercial Molasses Corp. v. New York T. B. Corp.,* (1941) U. S. , 62 S. Ct. 156, 86 L. ed. Adv. Ops. 125.

V. PRAYER FOR WRIT OF CERTIORARI.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal

of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court on a day certain to be thereafter designated, a full and complete transcript of the record of the proceedings in said Court entitled "Texas Gulf Sulphur Company, Inc. v. Steamship 'Plow City' and Plow City Steamship Company, her Claimant, No. 7648, October Term, 1940" to the end that said cause may be reviewed and determined by this Court; that petitioner may have such relief as this Court may deem proper; and that the opinion and decrees of said United States Circuit Court of Appeals for the Third Circuit may be reversed by this honorable Court.

PLOW CITY STEAMSHIP COMPANY,

By .....

GEORGE E. BEECHWOOD,

JAMES S. BENN, JR.,

CONLEN, LABRUM & BEECHWOOD,

Proctors for Petitioner.

CERTIFICATION.

I hereby certify that I am a member of the bar of the Supreme Court of the United States; that I am proctor for Plow City Steamship Company, the petitioner; that the foregoing petition has been prepared in accordance with the request of petitioner; that the allegations in said petition are true to the best of my knowledge, information and belief; and that said petition is not made for the purpose of delay or prolongation of litigation; and is in my opinion well founded in law and in fact, and should be granted.

GEORGE E. BEECHWOOD.